STATE OF MICHIGAN

IN THE SUPREME COURT

AMERICAN ALTERNATIVE INSURANCE COMPANY, INC., a New York Corporation, Individually, and as Subrogor of DVA AMBULANCE, INC.,

Plaintiff-Appellant,

-vs-

DONALD JEFFREY YORK,

Defendant-Appellee.

Supreme Court No. 121968

Court of Appeals No. 227917

Shiawassee County Circuit Court File No. 98-2751-CK
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DEFENDANT-APPELLEE'S SUPPLEMENTAL BRIEF IN OPPOSITION TO PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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SECTION 500.3135(3)(a) OF THE NO-FAULT ACT UNAMBIGUOUSLY EXPRESSLY APPLIES ONLY TO "TRUE INTENTIONAL TORTS" AND CIRCUMSTANCES WHERE A PERSON ACTS **KNOWING** HARM IS **SUBSTANTIALLY CERTAIN**.

Section 3135(3)(a) of the no-fault act provides in pertinent part as follows:

> Notwithstanding any other provision of law, tort liability arising from the ownership, maintenance, or use within this state of a motor vehicle . . . is abolished except as to:
>
> (a) ***Intentionally caused*** harm to persons or property. ***Even though a person knows that harm to persons or property is substantially certain*** to be caused by his or her act or omission, ***the person does not cause or suffer that harm intentionally*** if he or she acts or refrains from acting for the purpose of averting injury to any person, including himself or herself, or for the purpose of averting damage to tangible property.

MCL 500.3135(3)(a); MSA 24.13135(3)(a) (emphasis supplied).

Section 3135(3)(a) unambiguously expresses the Legislature's intent with respect to the standard by which a tort-feasor's conduct is to be measured. §3135(3)(a) [formerly §3135(2)(a)] "unambiguously requires a person to intend to cause harm . . . . " See Hicks v Vaught, 162 Mich App 438, 440; 413 NW2d 28 (1987).

The first sentence of §3135(3)(a) provides that a person that ***"intentionally cause[s] harm to . . . property"*** has no immunity from liability for that damage. Certainly, then, §3135(3)(a) nullifies the immunity a person otherwise would have against a claim for property damage where the person commits a so-called "true

intentional tort" because the person intended not only his actions, but also the resulting damage.[1]

The second sentence of §3135(c)(3), however, also makes clear that the Legislature intended that *some* conduct, expressly and narrowly defined, not tantamount to a "true intentional tort" likewise would nullify immunity from liability for resulting damage. In that regard, the second sentence of §3135(3)(a) provides that "a person [that] ***knows that harm to . . . property is substantially certain*** to be caused by his act or omission" is entitled to immunity if acting to avoid injury to another or damage to property. The Legislature would have had no cause to expressly immunize from liability a person that acts "know[ing] that harm to . . . property is substantially certain" in the limited circumstance declared if the statute otherwise did not contemplate liability in that circumstance generally.[2]

The express language of §3135(3)(a), then, makes clear that the Legislature intended that there be no §3135(3) immunity from liability for property damage caused ***only:***

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[1]See Beauchamp v Dow Chemical Co, 427 Mich 1, 20; 398 NW2d 882 (1986), for an instructive discussion of the elements of a "true intentional tort."

[2]The Legislature thus adopted the common law concept of the "substantial certainty intentional tort." See, e.g., Beauchamp, supra, at 20-22. That common law concept, like §3135(3)(a), recognizes that an intentional tort occurs where a person "***intended the act*** that caused the injury ***and knew*** that the injury was substantially certain to occur from the act . . . ." Id at 20 (emphasis supplied). That is, "***[i]f the actor knows*** that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result." Id at 21 (footnote omitted; emphasis supplied). The "substantial certainty intentional tort" standard requires "certainty," or, "inevitability;" a "substantial likelihood" is insufficient. Id at 25. Moreover, the standard is not satisfied by "reckless" conduct. Id at 24.

1) where the person commits a "true intentional tort;" that is, where the person intended not only his actions but also the resulting harm; and

2) where the person commits a "substantial certainty intentional tort;" that is, where the person acts "know[ing] that harm to . . . property is substantially certain to be caused . . . ."

The statute nowhere includes any language suggesting that the Legislature contemplated any other circumstance for which a person is to be denied the immunity otherwise provided by §3135(3), and particularly nowhere includes any language suggesting that "wilful and wanton" misconduct is such a circumstance.

The Legislature over the years clearly has been aware of the "wilful and wanton" standard for judging misconduct, and frequently has employed that precise phrase in its statutes. See, for example, the good samaritan act, MCL 691.1502(1); MSA 14.563(12)(1); the guest passenger act, formerly at MCL 257.401; MSA 9.2101; the recreational use act, formerly at MCL 300.201; MSA 13.1485, now at MCL 324.73301(1); MSA 13A.73301(1). See, e.g., Jennings v Southwood, 446 Mich 125, 138-139; 521 NW2d 230 (1994). Accordingly, because the Legislature demonstrably knows how to impose the "wilful and wanton" misconduct standard when it so intends, the Legislature cannot be said to have intended that standard in a statute that includes no reference to such a standard and that unambiguously expresses only a different, more exclusory, standard. Id at 137-142. See also Pavlov v Community Emergency Medical Services, Inc, 195 Mich App 711, 717; 491 NW2d 874 (1992), lv den, 442 Mich 884 (1993).

Given that the Legislature at §3135(3)(a) has declared the standard by which the courts are to judge whether a person has committed intentional damage

nullifying the immunity the no-fault act otherwise provides, the courts have no authority to impose, or "engraft," a different standard. The authority to establish such a standard is the Legislature's alone. Pavlov v Community Emergency Medical Services, Inc, supra, at 717. See also Jennings v Southwood, supra, at 521 (where a statute expressly describes a standard to be applied, that "express mention . . . of one [standard] applies to the exclusion of other [standards]"). "Where the language of the statute is clear and unambiguous, the Court must follow it." Robinson v Detroit, 462 Mich 439, 459; 613 NW2d 307 (2000) (citations omitted).

In Pavlov, supra, the plaintiff had argued that the legislative standard declared in "the former emergency medical services act, MCL 333.20701, et seq; MSA 14.15(20701), et seq," requiring "gross negligence or wilful misconduct" included also "wilful ***and wanton*** misconduct." Pavlov, supra, at 714-716 (emphasis supplied). The Pavlov Court rejected that argument, observing that the plaintiff's proposed standard "is not included in [the statute's] plain language," that the Court did not "possess that legislative power and authority," and that "[h]ad the Legislature wished . . . it could have used the phrase "wilful and wanton" as it appears in, for example, the recreational user's statute . . . ." Id at 717. The Jennings Court agreed with the Pavlov analysis. Jennings, supra, at 138-142.

CONCLUSION

Given all of the foregoing, Citizens Ins Co v Lowry, 159 Mich App 611; 407 NW2d 55 (1987), upon which Plaintiff and the Trial Court relied, is wrongly decided. In Lowry, the Court held that the parties' stipulation that the defendant had engaged in "wilful and wanton misconduct" pursuant to §3135(3)(a) operated to deny the defendant the immunity provided by §3135(3) because "wilful and wanton misconduct is in the same class as intentional wrongdoing." 159 Mich App at 617.

Thus, as the Court of Appeals in these proceedings observed, the Lowry decision opinion is overbroad because subject to an interpretation (like the Trial Court reached) that the §3135(3)(a) standard for misconduct "include[s] conduct less than intentional, such as recklessness. . . ." The Court of Appeals in these proceedings accordingly limited the Lowry decision.

The Lowry Court wrongly concluded that "willful and wanton" misconduct necessarily is tantamount to the "intentional" misconduct contemplated by §3135(3)(a). While the Court of Appeals in these proceedings committed some discussion to its effort to narrow rather than to reject entirely the Lowry opinion, there exists no sound reason to continue the exercise involved in determining the application of §3135(3)(a) in particular cases whether conduct admittedly or arguably "willful and wanton" is also "intentional."

Rather, the analysis to determine the application of §3135(3)(a) should be, simply: 1) whether the defendant intended harm or 2) whether the defendant engaged in misconduct knowing that harm was substantially certain to follow. If so, in either case, a defendant is not entitled to the immunity otherwise provided by

§3135(3)(a). No purpose is served by determining instead, or also, whether the defendant's misconduct was willful and wanton.

The Court of Appeals in these proceedings appropriately determined that the evidence did not permit the conclusion that Defendant-Appellee York intentionally caused the property damage about which Plaintiff-Appellant complains or acted knowing that harm as a result of his act was substantially certain.[3] Accordingly, the Court of Appeals appropriately reversed the Trial Court's decision that Defendant-Appellee York is not entitled to the immunity provided by §3135(3)(a) of the no-fault act.

The Court of Appeals in these proceedings, however, unnecessarily preserved a "willful and wanton" misconduct analysis in reaching the correct result. This Court in a peremptory order might well correct that consequence.

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[3]The language of §3135(3)(a) requires that the Trial Court have determined York's ***subjective*** intent. See, e.g., Frechen v DAIIE, 119 Mich App 578, 580-582; 362 NW2d 566 (1982), cited with approval in Hicks, supra, at 440. The Frechen Court acknowledged that "[m]ost automobile accidents involve volitional acts, such as speeding, drunk driving, or disobedience to traffic signals, which yield unintentional consequences." 119 Mich App at 581 (emphasis supplied).

RELIEF REQUESTED

WHEREFORE, for the foregoing reasons, pursuant to MCR 7.302(G)(1), Defendant-Appellee York prays that this Court issue a peremptory order that:

1) affirms the Court of Appeals; but that

2) rejects any language in Citizens Ins Co of America v Lowry, supra, or the opinion of the Court of Appeals below, that suggests that a "willful and wanton" misconduct analysis is appropriate to determine whether a defendant is entitled to the immunity provided by §3135(3)(a) of the no-fault act, MCL 500.3135(3)(a); MSA 24.13135(3)(a).

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Dated: 11/25/03 By _____
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